

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of John W. Richardson as Receiver for the Alisal Water Corporation to sell and transfer the water systems in Monterey County to Pajaro Sunny Mesa Community Service District.

Application 05-03-003  
(filed March 4, 2005)

Application of JOHN W. RICHARDSON (ALISAL WATER CORPORATION), to sell and transfer the Moss Landing water system in Monterey County to Pajaro Sunny Mesa Community Service District.

Application 05-03-006  
(filed March 4, 2005)

**SCOPING MEMO AND RULING OF ASSIGNED  
COMMISSIONER AND ADMINISTRATIVE LAW JUDGE**

Pursuant to Rules 6(a)(3) and 6.3 of the Commission's Rules of Practice and Procedure,<sup>1</sup> this ruling sets forth the procedural schedule; assigns the principal hearing officer; addresses the scope of these proceedings following the prehearing conference (PHC) held June 7, 2005, and subsequent legal briefing by the parties on the standard of review and *res judicata*; and denies the July 1, 2005, motion of Pajaro Sunny Mesa Community Services District to modify its status from "applicant" to "interested party." This ruling is appealable only as to category of these proceedings under the procedures in Rule 6.4.

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<sup>1</sup> All references to Rules are to the Commission's Rules of Practice and Procedure found in Title 20 of the California Code of Regulations.

### **1. Categorization and Consolidation of Proceedings**

Under Rule 6.1, on March 17, 2005, the Commission preliminarily categorized Application (A.) 05-03-003, the application of John W. Richardson as Receiver for the Alisal Water Corporation to sell and transfer the water systems in Monterey County, and A.05-03-006, the application of John W. Richardson as Receiver for the Alisal Water Corporation to sell and transfer the Moss Landing water system in Monterey County, as ratesetting as defined in Rule 5(c) and determined that the matters do not require hearings. (Resolution ALJ 176-3149.) By ruling on May 17, 2005, these proceedings were consolidated. No party objects to the Commission's preliminary categorization of ratesetting for these proceedings, and we affirm it.

### **2. Procedural Background**

By orders entered April 9, 2002, and June 26, 2002, in *United States of America v. Alisal Water Corporation et al.*, Case No. C97-20099, the District Court for the Northern District of California (District Court) appointed John W. Richardson as receiver for the Alisal Water Corporation. After hearings before the District Court, on April 13, 2004, the District Court entered its Order Regarding Sale of Receivership Assets. Under the terms of the sale order, the District Court directed the Receiver to sell the water systems that are the subject of these applications to Pajaro Sunny Mesa Community Services District (Pajaro/Sunny Mesa), and specified the sale prices for those sales. By these applications, the Receiver and Pajaro/Sunny Mesa seek a Commission order authorizing the transfers pursuant to Pub. Util. Code §§ 851 through 854.

### **3. Standard of Review**

Pub. Util. Code § 851, in relevant part, requires Commission approval before a public utility may sell the whole or any part of its system. Section 854(a)

prohibits any person or corporation to acquire a public utility without prior Commission authorization. The Commission has long interpreted Section 851 and the ensuing code sections to prohibit acquisitions, mergers, and transfers of control unless the Commission finds the proposed transaction to be in the public interest. (D.02-12-068, *mimeo.*, p. 6.)

Where a community services district is to be the purchaser, our review of whether the proposed transfers are in the public interest is substantially different from instances where the sale is between private parties:

In the common transfer proceedings between private parties, the function of the Commission is to prevent the impairment of the public service of a utility which could result from the transfer of utility property into the hands of parties incapable of performing an adequate service at reasonable rates or upon terms which would bring about the same undesirable result (Southern Cal. Mountain Water Co. (1912) 1 CRC 520). But such concerns are not the determinant where a community services district is involved. If the Commission were to impose terms not acceptable to a district, the proposed sale could be abandoned and the district could resort to its eminent domain alternative (See *People ex rel. PUC v City of Fresno* (1967) 254 CA 2d 76; petition for hearing denied by Supreme Court 11/22/67). Furthermore, after transfer and sale to a district, the customers transferred must continue to receive service and rates that are “fair, reasonable, just, and nondiscriminatory.” (See *Hansen v City of San Buenaventura* (1985) 213 C[al.] Rptr. 859.)

*In re Park Water* (D.88-10-030), 29 CPUC2d 415.<sup>2</sup> Thus, for example, the Commission has found the standard to have been met upon a finding that the

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<sup>2</sup> California Water Service Company submits that this language (as it is similarly stated in *Bidwell Water Company, Inc.* (D.02-10-003), *mimeo.* at p. 3) should not govern the standard of review because *Hansen v. City of San Buenaventura* was superseded by grant of review and then reversed by *Hansen v. City of San Buenaventura*, 42 Cal.3d 1172, 233

*Footnote continued on next page*

public entity will operate and maintain the system with the lowest rates possible consistent with providing reliable service to the community. (D.03-08-055; D.02-10-050.)

#### **4. Issues**

Based on the applications, the protest of Alisal Water Corporation (Alisal), the Receiver's and California Water Service Company's (Cal Water) replies, the discussion at the prehearing conference, and the briefs on standard of review and res judicata, we identify the following issues for resolution in this proceeding:

- Whether the receiver lacks standing to file these applications;
- Whether the applications comply with Rule 35(c), which requires applications to provide detailed reasons for entering into the proposed transaction and the facts warranting it;
- Whether the applications comply with Rule 35(b) requiring a statement of the book cost and original cost of the property to be transferred;
- Whether Alisal's violations of law and fitness or lack thereof support an order that the utility divest itself of the water systems;
- Whether the sales prices are confiscatory;
- Whether the proposed transferee is fit;
- What is the rate impact of the proposed transfers; and
- Whether the applicant has transferred operational and managerial control without prior Commission approval in violation of Pub. Util. Code § 856.

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Cal. Rptr. 22 (1986). However, the particular language cited by the Commission is itself based on decisions that are still good law, and the premise that rates established by a public entity are presumed reasonable, fair and lawful is reiterated in the later, California Supreme Court decision reversing the earlier decision. (42 Cal.3d at 26.)

## 5. Need for Hearing

Applicants proposed that no hearings are needed, and the Commission preliminarily agreed. (Resolution ALJ 176-3149.) Alisal requests hearings on (1) whether Alisal's violations of law and level of fitness support an order that the utility divest itself of the water systems, (2) whether the sale prices are confiscatory, and (3) the fitness of the proposed transferee. Based on the applications, the pleadings, and the discussion at the prehearing conference, we confirm the preliminary determination that hearings are not needed.

Alisal litigated the issues on which it seeks evidentiary hearing in *United States of America v. Alisal Water Corporation et al.*, Case No. C97-20099. The District Court order determines that Alisal should divest itself of the properties, establishes the sale price for the properties, and finds that Pajaro/Sunny Mesa is capable of operating the systems and in compliance with the law. Alisal does not dispute any of the material facts upon which the District Court bases its factual findings, but seeks to introduce evidence of mitigating factors or other evidence that the District Court did not consider when it issued its divestiture orders against Alisal. Alisal has appealed the District Court order to the Ninth Circuit Court of Appeal. After nearly eight years of litigation of these issues before the District Court, due process does not require, and the principles of *res judicata* militate against, allowing Alisal an evidentiary hearing on these issues.

Although Alisal does not assert the need for hearings on the issue of rate impact in its protest, it indicated at the prehearing conference that it would offer evidence on whether Pajaro/Sunny Mesa imposes discriminatory rates, and later suggests, in its brief on *res judicata*, that hearings are needed in order for the Commission to assess whether the rates Pajaro/Sunny Mesa will impose are unfair, unreasonable or discriminatory. We disagree. Although we direct the

applicants to provide additional information on the issue, the additional information we request is not reasonably subject to factual dispute and does not therefore indicate the need for hearings.

Furthermore, although the protestant bears the burden of proving that the rates fixed by the district are unreasonable or unfair (*Hansen v. City of San Buenaventura, supra*), Alisal does not assert that Pajaro/Sunny Mesa's rates will be unreasonable or unfair, and makes no offer of proof to that effect. There is no basis, under these circumstances, to undertake evidentiary hearings on the issue of rate impact of the proposed transfer.

We affirm the preliminary determination of no need for hearing. The *ex parte* rules as set forth in Rule 7(e) apply.

## **6. Submission of Additional Information**

We direct the parties to file and serve additional information as follows:

1. The Receiver and/or Pajaro/Sunny Mesa shall provide a declaration or other documentary evidence of the dates, locations, content of notices, and form of notice (including parties served, if any) of the public hearings held by the District Court in *United States of America v. Alisal Water Corporation et al.*, Case No. C97-20099, regarding the proposed transfers. (See, e.g., reference to such public hearings at page 5 of Receiver's Response to Protest of Alisal Water Corporation, May 31, 2005.)
2. The Receiver and/or Pajaro/Sunny Mesa shall provide a declaration or other documentary evidence identifying the impact on customer rates as a result of the proposed transfers.
3. Pajaro/Sunny Mesa shall provide the resolution of the governing body that formed it, and any other resolutions or applicable law describing or directing the District's duties and obligations with respect to providing water service.

4. To the extent that such information is not contained in the resolutions described above, Pajaro/Sunny Mesa shall provide a declaration or other documentary evidence summarizing its procedures for setting rates and the basis upon which it sets rates for water service.
5. Protestant Alisal shall provide a declaration or other documentary evidence of the book cost and the original cost of the properties proposed for transfer in these applications.

## **7. Pajaro Sunny Mesa Community Service District's Status**

Pajaro/Sunny Mesa, the proposed transferee, is named as a co-applicant in the applications, and the applications are signed by its general manager, Joe Rosa. Although Pajaro/Sunny Mesa did not appear at the June 7, 2005, prehearing conference, by virtue of having signed the applications we deem it to be a party to the proceeding with all attendant rights and obligations.

By motion filed July 1, 2005, Pajaro/Sunny Mesa seeks to modify its status from "applicant" to "interested party." Pajaro/Sunny Mesa states that, after reviewing the Commission regulations and the District Court's sale order, it believes that its status is best designated and characterized as an "interested party" because it is not regulated by the Commission or under the Commission's jurisdiction or control, and because the District Court did not direct Pajaro/Sunny Mesa to apply to the Commission for approval of the proposed sale.

To the extent that Pajaro/Sunny Mesa is concerned that its designation as an "applicant" places it under the Commission's jurisdiction, its concern is unfounded. Pajaro/Sunny Mesa is not a public utility subject to the Commission's regulatory authority and will not become a public utility if the proposed transfers are approved; designating Pajaro/Sunny Mesa as an "applicant" does not alter that fact. Nor do our rules require "applicants" to be

public utilities. An “applicant” is a party that initiates an application. Although applicants are usually entities subject to our jurisdiction, this is not always the case. For example, a party seeking rehearing of a Commission decision pursuant to Article 21 need not be a public utility, but is an “applicant” for purposes of the rehearing application. Applicants seeking to construct a public highway across a railroad under Rule 38 are not public utilities, but may be municipalities, counties, states, or other governmental authorities. The fact that Commission approval is statutorily required for certain actions does not make the party seeking such approval a public utility.

The Receiver’s brief on legal standards indicates that Pajaro/Sunny Mesa informed the Receiver that Commission approval of the proposed sales is not required because Pajaro/Sunny Mesa is not regulated by the Commission. We advise the Receiver and Pajaro/Sunny Mesa that is not the case. Pub. Util. Code § 851 requires the Commission to approve any and all sales and dispositions of public utility property that is used and useful in the transferor’s performance of its duties to the public. Section 854(a) prohibits any person or corporation to acquire a public utility without prior Commission authorization. Any sale or disposition that occurs without our approval is void and without legal effect. There is no statutory exemption for sales to entities that do not fall within the Commission’s jurisdiction.

In order to evaluate whether these proposed transactions meet the standard for review, the Commission necessarily requires the appearance of the proposed transferee. This requirement is reflected in Rule 35 which requires all parties to the proposed transaction to sign the application, thus certifying the facts and legal contentions stated in it (Rule 2.2(b)).



Pajaro/Sunny Mesa’s status as “applicant” appropriately reflects that it is a signatory to the applications. It does not place Pajaro/Sunny Mesa under the Commission’s regulatory authority. However, Pajaro/Sunny Mesa’s participation as a signatory to the applications is required for our consideration of the applications. Accordingly, we deny Pajaro/Sunny Mesa’s motion to change its status from “applicant” to “interested party.”

## 8. Briefing and Schedule

Parties may brief the issues identified in this scoping memo pursuant to the following schedule. To the extent that parties have addressed any of the issues in their protest, responses, or legal briefs on *res judicata*, they may incorporate them by reference in their opening and reply briefs.

The following schedule will be adhered to as closely as possible.

Event	Date
Applications filed	March 4, 2005
PHC held	June 7, 2005
Briefs on <i>res judicata</i> filed	June 29, 2005
Scoping Memo issued	July 18, 2005
Additional information to be filed	August 5, 2005
Concurrent Opening Briefs	September 7, 2005
Concurrent Reply Briefs	September 21, 2005
Draft Decision	December 20, 2005
Opening Comments	January 9, 2006
Reply Comments	January 16, 2006
Commission Decision	January 2006

In Section 1 of Senate Bill (SB) 960 (Ch. 96-0856), the Legislature urges the Commission to resolve the issues within the scope of a proceeding categorized as ratesetting, such as this, within 18 months from the date of the filing of the

application. The schedule that we have adopted should allow us to meet that goal.

Pursuant to Rule 8(d), parties requesting final oral argument before the Commission should include that request in their concurrent opening briefs.

**IT IS RULED** that:

1. The schedule and issues to be addressed are set forth in this Scoping Memo, unless subsequently modified by the Assigned Commissioner or Presiding Officer.
2. This ruling confirms the Commission's preliminary finding in Resolutions ALJ 176-3146 that the category for these proceedings is ratesetting, and the determination that hearings are not necessary. This ruling, only as to category, is appealable under the procedures in Rule 6.4.
3. The *ex parte* rules as set forth in Rule 7(e) of the Commission's Rules of Practice and Procedure apply to this application.
4. Pajaro Sunny Mesa Community Service District's motion to modify its status from "applicant" to "interested party" is denied.

Dated July 18, 2005, at San Francisco, California.

/s/ DIAN M. GRUENEICH  
Dian M. Grueneich  
Assigned Commissioner

/s/ HALLIE YACKNIN  
Hallie Yacknin  
Administrative Law Judge

## **CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge on all parties of record in this proceeding or their attorneys of record.

Dated July 18, 2005, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

## **N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.